

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34706

STATE OF IDAHO,	)	2009 Unpublished Opinion No. 569
	)	
Plaintiff-Respondent,	)	Filed: August 18, 2009
	)	
v.	)	Stephen W. Kenyon, Clerk
	)	
RONALD E. WHITMORE,	)	THIS IS AN UNPUBLISHED
	)	OPINION AND SHALL NOT
Defendant-Appellant.	)	BE CITED AS AUTHORITY
	)	

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Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Michael E. Wetherell, District Judge.

Judgment of conviction for possession of a controlled substance, driving without privileges, transporting an open container, and possession of drug paraphernalia and unified sentence of seven years, with a minimum period of confinement of one and a half years for possession of a controlled substance, affirmed.

Molly J. Huskey, State Appellate Public Defender; Jason C. Pintler, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Rosemary Emory, Deputy Attorney General, Boise, for respondent.

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PERRY, Judge

Ronald E. Whitmore appeals from his judgment of conviction for possession of a controlled substance, driving without privileges, transporting an open container, and possession of drug paraphernalia and challenges the excessiveness of his unified sentence of seven years, with a minimum period of confinement of one and a half years for possession of a controlled substance. For the reasons set forth below, we affirm.

I.

FACTS AND PROCEDURE

Whitmore was arrested for driving without privileges after he was pulled over for a burned out headlight. During a subsequent search of the vehicle, police discovered an open can of beer and a glass pipe with methamphetamine residue. Whitmore was charged with felony

possession of a controlled substance, I.C. § 37-2732(c), and misdemeanor charges of driving without privileges, I.C. § 18-8001(3); transporting an open container, I.C. § 23-505; and possession of drug paraphernalia, I.C. § 37-2734A. Throughout the preliminary proceedings, Whitmore complained about his representation by the public defender's office. The district court granted Whitmore several continuances in order to hire private counsel or to proceed pro se. Eventually, after Whitmore had indicated that he would no longer accept any representation from public defenders and would proceed pro se, the district court granted Whitmore's request that the public defender's office be re-appointed.

The attorney from the public defender's office assigned to represent Whitmore was the same attorney with whom he had disagreements earlier. On the eve of trial, Whitmore wanted to again proceed pro se. On the day of trial, Judge Goff presided over the proceedings in place of Judge Wetherell who had presided over the proceedings up to that point. Whitmore's appointed counsel disclosed his client's request to fire the public defender's office and to proceed pro se or with other appointed counsel. Judge Goff entered a pre-written order drafted by Judge Wetherell after several hearings which held that Whitmore's appointed counsel was competent and no further continuances would be granted. After the district court explained the meaning of effective assistance of counsel and attempted to engage in further colloquy with Whitmore, Whitmore interrupted and ended the conversation stating, "Let's go on with it." Whitmore then proceeded to trial with his appointed counsel from the public defender's office. A jury found Whitmore guilty of all charges. The district court sentenced Whitmore to a unified term of seven years, with a minimum period of confinement of one and a half years, for possession of a controlled substance. Whitmore appeals, arguing that he was not afforded a full and fair opportunity to explain his reasons for requesting substitute counsel and challenging his sentence for possession of a controlled substance as excessive.<sup>1</sup>

## **II.**

### **ANALYSIS**

#### **A. Substitute Counsel**

Whitmore argues that the district court at trial erred by not affording him a full and fair opportunity to present the facts and reasons in support of his request for substitute counsel. The

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<sup>1</sup> The district court also sentenced Whitmore to time already served on the misdemeanor charges, and he does not challenge the excessiveness of these sentences on appeal.

state responds that Whitmore has failed to properly preserve this issue for appeal through a timely objection below. Additionally, the state argues that any error was invited by Whitmore's abrupt termination of the colloquy with the district court and, moreover, this resulted in no adverse ruling being entered on Whitmore's request for substitute counsel. Alternatively, the state contends that Whitmore was afforded a full and fair opportunity to present his reasons for wanting substitute counsel throughout his proceedings.

Upon showing of good cause, a trial court may appoint substitute counsel for an indigent defendant. That decision is within the discretion of the trial court. *State v. Clayton*, 100 Idaho 896, 897, 606 P.2d 1000, 1001 (1980). The standard of review is an abuse of discretion standard, found when the denial of the motion results in a violation of the defendant's right to counsel. *State v. Priest*, 128 Idaho 6, 11, 909 P.2d 624, 629 (Ct. App. 1995). In *Clayton*, the Idaho Supreme Court considered a defendant's contention that the trial court did not conduct a sufficiently detailed inquiry into the reasons for the defendant's requests for appointment of substitute counsel. In addressing that issue, the Supreme Court held that the trial court need not act as an advocate for a defendant, but must "afford defendant a full and fair opportunity to present the facts and reasons in support of his motion." *Id.* at 898, 606 P.2d at 1002.

In this case, immediately prior to Whitmore's trial and before the jury was brought in for selection, the following exchange took place:

[COUNSEL]: Yes, Your Honor. It's my understanding that my client wishes to fire my office, and myself in particular, from this case and wishes to have the opportunity to have other counsel appointed or hired prior to his trial in this matter.

[COURT]: Mr. Whitmore, is that correct?

[WHITMORE]: Yes, sir.

[COURT]: Let me tell you what. I just called -- they called me this week and asked me to come over to do this trial. The jury is here, so we are going to trial.

You have two choices. You can proceed to trial with this attorney that's prepared to go to trial, or you can -- under the Constitution, you can waive your right to be represented at trial and represent yourself during the jury trial. But --

[WHITMORE]: Judge, I've --

[COURT]: Excuse me. Excuse me. I have also visited with Judge Wetherell who assigned to this case. He has typed out a written history, if you will, of the cases. This case and the procedure in this case is over a year old. And he has given you a continuance before for you to hire your own attorney, and you showed back up in court without hiring your own attorney. You were going

to represent yourself and then asked for the public defender's office to be re-appointed.

These are just some of the summaries that I can recall that he told me in the five minutes that I had with him.

At this point, the district court told Whitmore that he had to choose between proceeding pro se or with his current counsel without affording Whitmore the opportunity to fully explain his reasons for needing substitute counsel. However, Whitmore interjected:

[WHITMORE]: I didn't get another attorney; I got stuck with [this counsel]. And he's had a conflict of interest throughout this whole case. *Just like now I feel there is critical evidence in this on my behalf that should be here and presented. It's not. I feel he's totally ineffective assistance of counsel.*

[COURT]: You're entitled to the Constitutional right. Your Constitutional right entitles you to have what we call effective assistance of counsel.

[WHITMORE]: And I don't have that.

[COURT]: Excuse me. Don't interrupt me again. You'll be sitting in jail, and we'll send the jury home. Do you understand me?

[WHITMORE]: Yes, sir.

[COURT]: That's your warning. No more warnings. I give persons one more warning -- one warning, no more than that. You just had your warning. If I have another interruption by you, you're going to jail for contempt of court for interfering with these proceedings. Do you understand?

[WHITMORE]: Yes, sir.

[COURT]: All right. Now, you do have a Constitutional right to have effective assistance of counsel. . . .

(Emphasis added). The district court advised Whitmore of the meaning of effective assistance of counsel and explained to him that the district court would know if trial counsel was unprepared in the law and that Whitmore could let the district court know if trial counsel was not prepared in the facts. The district court explained that, if this happened, it would call a recess and allow Whitmore to argue the matter. Judge Goff then read the order from Judge Wetherell ruling that no further continuances would be granted in this matter. The following exchange occurred:

[WHITMORE]: May I ask a question?

[COURT]: Yes.

[WHITMORE]: *But aren't I entitled to have evidence gathered on my behalf?*

[COURT]: If you supply timely to your attorney --

[WHITMORE]: Oh, I have, sir.

[COURT]: -- and then your attorney has -- your attorney's legal responsibility is to sift through that and bring to the court only evidence that's in good faith he believes is admissible and relevant to the issues of this case.

So what's relevant to the issues of this case are really the facts and circumstances surrounding [the date of your arrest].

[WHITMORE]: So in other words, I get a bum attorney, that ain't really -- *he don't even like me*. He don't even -- he hasn't in the past. He's -- excuse me, sir. May I speak?

....

[COURT]: Whether . . . your attorney likes you or doesn't like you, whether he thinks you're guilty or not guilty does not matter. It's for a jury to decide. The jury is here. The jury is ready to go. . . . and we are going to go.

[WHITMORE]: So in other words --

[COURT]: Do you want to represent yourself, or do you want this attorney?

[WHITMORE]: I don't have the legal experience to represent myself. But I feel that I can do almost better than what he's doing. Because like I said, *he hasn't done nothing in this case. He didn't investigate it which I am entitled to. I have pointed out facts to gather evidence to him. For instance, have you ever gotten a motel receipt, a copy of it?* [Counsel]?

[COUNSEL]: I'm not going to sit here and answer your questions, Mr. Whitmore.

[WHITMORE]: I think I am entitled to have evidence presented on my behalf.

[COURT]: You are to relevant, probative evidence. So if you want to call it, present it, you're welcome to do so.

You need to answer my question. You wanted a different attorney. Your attorney at this point --

[WHITMORE]: Let's go on with it. Let's go on with it. We'll let the Supreme Court handle it.

[COURT]: Okay. Bring the jury in.

(Emphasis added).

Whitmore argues that he was not afforded a full and fair opportunity at the hearing before Judge Goff to explain his reasons for wanting substitute counsel. The state argues that this is because Whitmore terminated the conversation prematurely. We disagree that Whitmore invited any error because, at the point at which Whitmore interrupted, the district court was requesting that he answer its question of whether Whitmore wanted to proceed pro se or with his current attorney. The district court did not ask any questions of Whitmore regarding his reasons for requesting substitute counsel or ask Whitmore to state his reasons for the record. Looking at the exchanges between Whitmore and the district court at this hearing alone, we cannot conclude

that the district court's inquiry gave Whitmore a full and fair opportunity to explain the reasons for his request.

However, Whitmore interjected on several occasions arguing his reasons why he thought his counsel was ineffective. These reasons given by Whitmore were the same arguments that he had made in several prior proceedings before Judge Wetherell regarding the performance of his appointed counsel. Whitmore's disagreements with appointed counsel were not new information for the district court. Almost from the start of his criminal proceedings he had argued that his counsel was ineffective and, on several occasions, was granted either a request to proceed pro se or to seek private counsel. In the end, he requested that the public defender's office be re-appointed. When counsel was re-appointed, Whitmore made the same arguments that he had made previously concerning ineffective assistance.

At an earlier hearing regarding a request for a mental evaluation, the following exchange occurred between Whitmore and the district court:

[WHITMORE]: Judge, may I speak, please? [Counsel] has lied to me several times. He was supposed to file a motion to separate these cases here the last time we spoke. He has failed to do that. He has had two hearings scheduled and never notified me of. Okay. [Counsel] I think has made a mess of this case and I want to fire him.

[COURT]: Well --

[WHITMORE]: I have that right even to do so.

[COURT]: -- you do if you're competent, Mr. Whitmore.

[WHITMORE]: Because he was supposed to separate these. Okay. And he has failed to do that. He has failed to get a copy of the receipt from the motel. He has failed to get in touch with witnesses. This is BS. Excuse me, Your Honor, but, no, he is not acceptable. It is malpractice is what this is.

[COURT]: All right.

[WHITMORE]: Terminated. I do not want his representation. Let's go.

[COURT]: Thank you, Mr. Whitmore.

The Court believes that the request for the order is appropriate and the mental evaluation will be ordered.

[WHITMORE]: You will find out I am not crazy. He's a punk. Don't come and see me.

After Whitmore was found competent, another hearing was held and the following exchange occurred:

[COUNSEL]: Your Honor, I guess the natural course of action would be to reset this matter for trial. It is my understanding that Mr. Whitmore intends to terminate my services today.

[WHITMORE]: And, Your Honor, I think he is under the influence of methamphetamines today. He is bouncing around here, profusely sweating. I would be willing to bet on it.

[COUNSEL]: I can inform the Court that I am not under the use of methamphetamines, and I am not a methamphetamine user.

[COURT]: Well, Mr. Whitmore, it is my understanding that it is your desire to dismiss your counsel and represent yourself. Is that correct?

[WHITMORE]: I want to dismiss because I have got several reasons. For one, I have asked several times for motions for discovery, which I have never seen in this case. We are nine months into this and I have asked for transcripts from the preliminary hearing. I have not received that. I have asked for that several times. I have asked him to get ahold of -- contact the motel parking lot and get a copy of the receipt. He has not done that. I have asked him to contact . . . my girlfriend at the hotel. He has not done that. He was supposed to have come in here and ask for a motion to separate the charges. He didn't. He lied to me.

He lied to you before that, Judge, when he asked for a motion to waive my right to speedy trial. That was a deal he made with me downstairs prior to coming up here. [Counsel] read this to me several times. He never said a word to me prior about this motion for mental evaluation or anything like that. I think he is lying to the Court, and I think he is lying to me.

[Counsel] has also -- I asked [Counsel] to file a motion to suppress evidence because I don't feel the police had any right to tow my car off the parking lot of the motel where I was staying. And that would be something that would be in the best interests of this case. He has failed to do that. He has lied to me. He has lied to the courts. I have not seen any copy of the videotapes or any inventory list that the police supposedly have had. We are nine months in to this case, Your Honor. What the [expletive] kind of representation is that? Mickey Mouse? He is terminated.

....  
[WHITMORE]: I would recommend that he get checked for drugs.

....  
[COURT]: Is it your desire to represent yourself?

[WHITMORE]: I would like a 90-day continuance. I will get my own representation, sir.

Upon reviewing the entire record of the proceedings over the course of Whitmore's rocky relationship with appointed counsel, we conclude that Whitmore had more than a full and fair opportunity to explain his reasons for requesting substitute counsel or to proceed pro se. At the hearing before Judge Goff, Whitmore was not presenting any new reasons why he should be appointed substitute counsel or allowed to proceed pro se. He was presenting the same reasons

that he had explained on numerous occasions and of which the district court was well aware. Whitmore does not argue that the district court abused its discretion by denying his request for substitute counsel, only that he was not afforded a full and fair opportunity to explain the reasons for his request. Therefore, we conclude that the district court did not err by denying him a full and fair opportunity to explain the reasons for his request for substitute counsel.

**B. Excessive Sentence**

Whitmore next argues that his sentence of a unified term of seven years, with a minimum period of confinement of one and a half years, for possession of a controlled substance is excessive under any view of the facts. Sentencing is a matter for the trial court's discretion. Both our standard of review and the factors to be considered in evaluating the reasonableness of the sentence are well established and need not be repeated here. *See State v. Hernandez*, 121 Idaho 114, 117-18, 822 P.2d 1011, 1014-15 (Ct. App. 1991); *State v. Lopez*, 106 Idaho 447, 449-51, 680 P.2d 869, 871-73 (Ct. App. 1984); *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). When reviewing the length of a sentence, we consider the defendant's entire sentence. *State v. Oliver*, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007). Applying these standards, and having reviewed the record in this case, we cannot say that the district court abused its discretion.

**III.**

**CONCLUSION**

Whitmore received a full and fair opportunity to explain his reasons for requesting substitute counsel throughout the course of the proceedings leading to trial. Whitmore's sentence for possession of a controlled substance is not excessive. Therefore, Whitmore's judgment of conviction for possession of a controlled substance, driving without privileges, transporting an open container, and possession of drug paraphernalia and his sentence for possession of a controlled substance are affirmed.

Chief Judge LANSING and Judge GRATTON, **CONCUR.**